

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL E. ASHBY,

Petitioner,

v.

ALICE PAYNE,

Respondent.

Case No. C05-5416FDB

ORDER ADOPTING REPORT
AND RECOMMENDATION

Petitioner, convicted of Second Degree Murder, was sentenced to 438 months confinement and admitted to the Washington Department of Corrections on January 8, 1991 after being transferred from the Pierce County Jail. The Jail certified 306 days of jail time and zero days of jail good-conduct time.

Petitioner raised the issue of entitlement to good conduct time while incarcerated in the Pierce County Jail by a personal restrain petition filed with the Washington State Court of Appeals, which issued its opinion on June 17, 2004. The entirety of that opinion is set forth in the Report and Recommendation, p. 4, and its main point is that "... despite Ashby's claim otherwise, he had a duty to act with due diligence in bringing his claim. Here he waited, without explanation, for 10 years before challenging the jail certification. Had he diligently made this claim, the County could have produced the records and defended against his challenge."

The Magistrate Judge recommends dismissal of Ashby's Section 2254 petition because his claims were adjudicated on the merits in state court proceedings and the State court decision was not contrary to, nor involved an unreasonable application of clearly established Federal law, as determined by the Supreme

1 Court of the United States; nor did the State court decision result in a decision that was based on an
2 unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

3 Ashby objects the Report and Recommendation citing a letter from his former attorney and his
4 having been transferred to prison in Minnesota for four years.

5 Ashby's objections are without merit. Reviewed in its entirety, the lawyer's letter does not reveal
6 that a determination was made, rather that a procedure was described, and his lawyer, after noting that he
7 was filing a personal restraint petition on his own, advised him to make the request of the jail and to then
8 file the petition if he objected to the certification. As to his being incarcerated out of state, Ashby could,
9 nevertheless have obtained the information about his jail credit at any time by writing a letter.


10 This Court agrees with the Washington Court of Appeals and with the Magistrate Judge, that
11 Ashby failed to act with reasonable diligence in this matter and his 2254 petition must be dismissed.

12 NOW, THEREFORE,

13 The Court, having reviewed the petition, the Report and Recommendation of the Hon. J. Kelley
14 Arnold, United States Magistrate Judge, objections to the Report and Recommendation, and the remaining
15 record, does hereby find and Order:

- 16 (1) The Court adopts the Report and Recommendation;
17 (2) The petition for writ of habeas corpus is DENIED;
18 (3) Petitioner's pending motions are moot and/or inappropriate and therefore DENIED; and
19 (4) The Clerk is directed to send copies of this Order to petitioner, to counsel for respondent,
20 and to the Hon. J. Kelley Arnold.

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22 DATED this 27th day of March 2006.

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25 
26 FRANKLIN D. BURGESS
27 UNITED STATES DISTRICT JUDGE
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